

Federal Court



Cour fédérale

Date: 20240422

Docket: T-1506-20

Citation: 2024 FC 604

Ottawa, Ontario, April 22, 2024

PRESENT: Mr. Justice McHaffie

BETWEEN:

MERIDIAN MANUFACTURING INC.

Plaintiff (Defendant by Counterclaim)

and

CONCEPT INDUSTRIES LTD.

Defendant (Plaintiff by Counterclaim)

ORDER AND REASONS

I. Overview

[1] Meridian Manufacturing Inc and Concept Industries Ltd have each brought discovery motions in this patent infringement action. Meridian's motion claims that Concept breached its discovery obligations by failing to produce relevant documents until after the examination for discovery of Concept's corporate representative, Lonny Thiessen. It asks the Court to sanction this breach by striking certain paragraphs in Concept's Statement of Defence and Counterclaim,

preventing Concept from relying on the new documents at trial, or awarding costs. Meridian's motion also seeks responses to certain undertakings given on the examination for discovery; production of unredacted copies of certain documents produced; an order substituting a different corporate representative for discovery in place of Mr. Thiessen; and other related relief.

[2] Concept's motion seeks answers to certain questions asked and undertakings given on the examination for discovery of Meridian's corporate representative, Samuel Plett; an order requiring Mr. Plett to re-attend for further examination; and related relief.

[3] The parties, to their credit, have resolved a number of the issues raised in their respective notices of motion. These reasons address the outstanding issues. On these issues, I conclude that: (a) while Concept did not comply with its obligations regarding documentary disclosure, this is not an appropriate case for the "very drastic" remedy of striking pleadings or for preventing Concept from relying on the new documents at trial; (b) it is just and appropriate to order Concept to pay certain costs thrown away as a result of its late production of documents, as well as certain costs associated with the continued discovery of Mr. Thiessen that Concept recognizes must occur; (c) Meridian has not satisfied me that an order substituting another corporate representative in place of Mr. Thiessen is appropriate; (d) the one question arising from Mr. Thiessen's examination that remains at issue (Question 348) should be answered; (e) unredacted copies of the documents at issue should be provided, for now, to Meridian's counsel on a counsel's-eyes-only basis; and (f) the two questions arising from Mr. Plett's examination that remain at issue (Questions 107 and 263) need not be answered.

[4] Meridian's motion is therefore granted in part, while the few remaining issues outstanding on Concept's motion are dismissed. Net costs of the motions are payable to Concept in the cumulative amount of \$1,500, in any event of the cause.

II. Meridian's Motion

A. *Background*

[5] Meridian's action, commenced in December 2020, alleges that Concept has infringed Canadian Patent No 3,036,430 [the '430 Patent]. The '430 Patent relates to a hopper bottom for supporting a storage bin such as a grain storage bin. The '430 Patent, and the key issues in dispute in the litigation, are described in Justice Zinn's decision dismissing the parties' requests for summary judgment: *Meridian Manufacturing Inc v Concept Industries Ltd*, 2023 FC 20 [*Meridian (Summary Judgment)*]. As Justice Zinn notes, one of Concept's defences is that the '430 Patent is invalid because it is anticipated by, or rendered obvious by, a prior art hopper made by JTL Industries Ltd known as the Force Air 360 Hopper [the JTL Hopper]: *Meridian (Summary Judgment)* at paras 2, 12, 51.

[6] Concept delivered its affidavit of documents under Rule 223 of the *Federal Courts Rules*, SOR/98-106 in December 2021. Concept's Schedule 1 disclosed 22 documents, although some of these consisted of multiple screenshots, videos, photographs, or drawings. In early 2022, the action was bifurcated on consent of the parties. Shortly thereafter, Concept brought a motion for summary judgment, seeking dismissal of the action on non-infringement and/or invalidity

grounds. In responding to Concept's motion, Meridian asked that summary judgment be granted in its favour. The motion was ultimately heard by Justice Zinn in late 2022.

[7] In his decision dismissing the motion, issued on January 4, 2023, Justice Zinn concluded that neither the infringement of the '430 Patent nor its validity could be determined on summary judgment and that the matter must therefore proceed to trial: *Meridian (Summary Judgment)* at paras 45–56. Among other things, Justice Zinn found that the evidence presented by Concept was insufficient to determine that the JTL Hopper was publicly available prior to the filing of the '430 Patent and that the validity of the patent could not be decided based on the facts and evidence provided by the parties on the motion for summary judgment: *Meridian (Summary Judgment)* at paras 54–55.

[8] Concept retained new counsel in April 2023. A timeline for steps in the proceeding was then set that called for, among other things, examinations for discovery to be completed by September 15, 2023. In advance of examinations for discovery, Meridian's counsel twice wrote to Concept's new counsel seeking to confirm that Concept had produced all relevant documents in their possession, power, or control. Mr. Thiessen was examined for discovery on September 5, 2023.

[9] Concept provided answers to undertakings given at the discovery on October 27, 2023, and followed this with a series of 68 new documents totalling 135 pages and three videos. This first tranche of new documents includes photographs and videos of JTL Hoppers in Walhalla, North Dakota and Grand Prairie, Alberta; photographs of a prototype hopper bottom in Roland,

Manitoba; as well as invoices, purchase orders, drawings, emails, a brochure, and several patents. It also included a document prepared by Michael Rosumowitsch, a design engineer with Concept and a former employee of JTL, entitled “Summary of different variations of the JTL aeration that were built over the years,” which purports to identify and illustrate those variations.

[10] Shortly thereafter, Concept again retained new counsel, who is their current counsel in the matter.

[11] In February 2024, while the current motion was outstanding, Concept produced a further tranche of 60 new documents. Forty of these documents are further videos and photographs of the same JTL Hopper in North Dakota depicted in the first tranche, while the other 20 are described by Mr. Thiessen as “various publicly-available prior art documents that were located either by myself or by counsel for Concept.”

[12] Meridian asserts that many of the documents produced after the discovery of Mr. Thiessen were in the possession, power, or control of Concept long before they were produced, and that Concept failed to comply with its disclosure and continuing disclosure obligations under Rules 223 and 226 of the *Federal Courts Rules*. It describes Concept’s failure to produce the documents in advance of Mr. Thiessen’s examination as intentional and sufficiently egregious to constitute an abuse of process.

B. *Preliminary Issue: Without Prejudice Communication*

[13] In support of its contention that Concept had new documents in its possession prior to Mr. Thiessen's discovery, Meridian points to a line in a text message sent on August 1, 2023, by Concept's President, Marshal Zacharias, to Meridian's Senior Vice President, Derek Neil. Mr. Neil's affidavit sworn in support of this motion refers to exchanging a number of text messages with Mr. Zacharias, "the content of which were in part without prejudice and included comments not relevant to Meridian's motion herein." Mr. Neil attaches a copy of the August 1 text message, "redacted to exclude comments that were without prejudice and not relevant." The redacted text message reveals a single sentence, on which Meridian purports to rely.

[14] In a responding affidavit, Mr. Zacharias provided the complete text message exchange. This showed that the August 1 text message Mr. Neil referred to was part of an exchange regarding the issue of settlement. The text message in question was lengthy, was marked "WITHOUT PREJUDICE" at the top, referred to developments in and the merits of the case, and indicated a willingness to engage in settlement discussions. Mr. Neil's response, similarly marked "Without Prejudice," also talked about the merits and settlement, inviting Mr. Zacharias to communicate any offer to settle through Meridian's lawyers.

[15] As I ruled during the hearing of this matter, the text message is inadmissible on this motion. Without prejudice communications between parties made in the course of efforts to settle their disputes are protected by settlement privilege and are presumptively inadmissible: *Sable Offshore Energy v Ameron International*, 2013 SCC 37 at paras 2, 11–13. This is so

whether or not communications are, as they were here, expressly marked as being “without prejudice”: *Sable Offshore* at para 14.

[16] Meridian argues that the text message comes within an exception to the settlement privilege, in that there is a competing public interest that outweighs the public interest in encouraging settlement: *Sable Offshore* at para 19. As Meridian notes, Justice Abella recognized these countervailing interests to include “allegations of misrepresentation, fraud, or undue influence”: *Sable Offshore* at para 19, citing *Unilever plc v Procter & Gamble Co*, [1999] EWCA Civ 3027, [2000] 1 WLR 2436 (CA Civ Div). I note that the exception described in *Unilever* relates to the admissibility of evidence of negotiations to show that a settlement agreement should be set aside on grounds of misrepresentation, fraud, or undue influence: *Unilever* at p 2444. Although the exception may extend beyond this specific context, it remains directed to an agreement concluded during or as a result of without prejudice negotiations, and remains a “very limited” exception: *Berkeley Square Holdings Ltd & Ors v Lancer Property Asset Management Ltd & Ors*, [2021] EWCA Civ 551 at paras 27, 30–53.

[17] Meridian argues that its allegations of abuse of process, and the Court’s ability to sanction failures to comply with documentary disclosure obligations, mean that the text message falls within this exception and should be admissible. As I ruled during the hearing of the motion, I disagree. This is not a situation where the validity of a settlement agreement or any other agreement is at stake. Meridian essentially seeks to rely on a statement in the text message as evidence of Concept’s possession of documents prior to Mr. Thiessen’s discovery in September, and to cross-examine him on his subsequent statements about Concept’s efforts to locate

documents. In the present context, I see no countervailing interest that outweighs the interests underlying the settlement privilege.

[18] Nor do I accept Meridian's argument that Concept waived the privilege by including the full text message exchange in its own responding motion record. Settlement privilege can certainly be waived, although it is a privilege jointly held by all parties to the communication, so it can only be waived on consent of all parties: *Flock Estate v Flock*, 2019 ABCA 194 at para 34; *Berkeley Square* at paras 38, 40, 58. In the present case, Concept filed the text message to demonstrate to the Court that they were without prejudice communications subject to settlement privilege, in a context in which Meridian had filed only a redacted copy revealing only one line of the message. I cannot take Concept's filing of the text message for the very purpose of asserting the privilege to constitute a waiver of the privilege. The text messages remain subject to settlement privilege and are inadmissible.

[19] I close on this point by reiterating a concern I identified at the hearing regarding the manner in which Meridian put forward this evidence. Mr. Neil's affidavit stated that his exchanges with Mr. Zacharias were "in part without prejudice" and that the copy of the text message he attached was redacted to remove "comments that were without prejudice and not relevant." The redactions included removing the "WITHOUT PREJUDICE" marking at the top of the text message, as well as the context confirming the settlement nature of the communication. Only in Mr. Zacharias's responding affidavit, made necessary by the nature of Mr. Neil's affidavit, was the full context of the exchange, including the "WITHOUT PREJUDICE" marking, put forward. Had the Court only had Mr. Neil's affidavit, it would have

been left with an inaccurate impression of the nature and content of the communication. To the extent Meridian wished to rely on an exception to settlement privilege, it ought to have been forthcoming in its evidence, identifying the statement as having been made without prejudice, and making its arguments regarding exceptions to the privilege accordingly.

C. *Late Disclosure*

(1) Concept failed to comply with its discovery obligations

[20] Meridian quite rightly emphasizes the importance to efficient and effective litigation of the documentary discovery obligations set out in Rules 223 and 226 of the *Federal Courts Rules*: *Apotex Inc v Sanofi Aventis*, 2010 FC 481 at para 3 [*Apotex*], citing *Apotex Inc v Sanofi Aventis*, 2010 FC 77 at para 16; *Havana House Cigar & Tobacco Merchants Ltd v Naeini*, 1998 CanLII 7605 (FC) at para 23. This importance is underscored by Rule 232, which prevents a party from relying on undisclosed documents at trial without leave of the Court. As Associate Judge Tabib (then Prothonotary) has pointed out, the rules governing documentary production aim to prohibit “trial by ambush” and to avoid a party being prejudiced by late disclosure of documents without sufficient time to adequately respond: *Apotex* at para 6.

[21] Even leaving aside concerns about attempts to hide adverse documents, late disclosure of documents leads to inefficiency, delay, and increased cost in litigation that is already expensive. It is wholly contrary to the general principle expressed in Rule 3 that seeks to secure the just, most expeditious, and least expensive outcome of every proceeding, with consideration being given to the principle of proportionality. At the same time, the Court recognizes, as does

Rule 226, that documents may be located, or their relevance identified, throughout the course of a proceeding, such that the production of additional relevant documents during litigation, and in particular complex patent litigation, is far from unusual.

[22] In the present case, the issue of whether the JTL Hopper constitutes invalidating prior art has been a key question in the action since Concept filed its Statement of Defence and Counterclaim in January, 2021, over three years ago. The need to diligently search for documents relevant to that issue, and to assemble its invalidity case based on the JTL Hopper, should have been clear to Concept since the outset of the matter. That obligation was not dependent on waiting for requests for documents during examinations for discovery or reminders from opposing counsel.

[23] I accept to some degree Mr. Thiessen's statements that the need to obtain further evidence to support Concept's invalidity arguments based on the JTL Hopper was made clear by Justice Zinn's decision in January 2023. However, Concept's obligation to search for, identify, and produce all relevant documentation pertaining to the issue—and not simply “enough” to prove its case—existed well before Justice Zinn's decision. I also find that although Mr. Thiessen states that Concept began undertaking “extensive efforts” to locate additional documents related to the JTL Hopper after Justice Zinn's decision, his evidence is far from clear as to why those efforts did not result in production of documents until late 2023, after discovery had been conducted.

[24] In particular, many of the photographs in the new productions appear to have come from the photo archives of Mr. Thiessen or another Concept employee. While Mr. Thiessen noted the large number of pictures in his photo stream, he was able to locate these photographs, and gave no evidence as to why they could not have been located and produced earlier. Similarly, while searches of Concept's records revealed additional documents, there was little evidence why these searches did not or could not have been undertaken much earlier in the litigation and in particular well prior to examinations for discovery.

[25] Indeed, the evidence is clear that some of the documents had been obtained and identified prior to this point. In particular, Mr. Thiessen describes a series of photographs as depicting the hoppers in North Dakota and Manitoba and as having been taken in January 2019 by a Concept employee as part of the design process of Concept's product. Mr. Thiessen's affidavit identifies these photographs as "WhatsApp Images" with a date of May 26, 2023, suggesting they were forwarded by the employee on that date. Mr. Thiessen admitted in cross-examination that he or Mr. Zacharias had received the documents in May. His evidence that they "just were not sure of the relevance at that point" provides little basis to explain why the photographs, later produced as relevant, were not produced at any time between May and September.

[26] As noted, the Court accepts that additional documents may be located and/or identified as relevant later in proceedings, including after discoveries in the process of responding to undertakings. However, given the evidence on this motion and the extent and nature of the documents produced, the Court is satisfied that Concept did not meet its documentary discovery obligations as set out in Rules 223 and 226 and that it has inadequately explained its failure or

inability to produce the new documents and serve a supplementary affidavit of documents until after the conduct of discoveries.

[27] At the same time, it is not every failure to comply with documentary discovery obligations that constitutes an abuse of process. Despite Meridian's efforts to paint Concept's failure as an egregious and deliberate attempt to delay the production of documents, I am not satisfied on the record before me that Concept engaged in a deliberate or flagrant attempt to hide or delay production for tactical or other advantage. Indeed, as Concept fairly notes, there can have been little benefit for it to hide or refuse to produce the documents in question, which Meridian itself recognizes are material to Concept's invalidity defences. Meridian's argument that Concept deliberately withheld the documents to induce Meridian into a settlement makes little sense and is unsupported on the record. While Concept can and should have done better, the record does not justify a conclusion that Concept's conduct amounted to an abuse of process.

(2) Appropriate remedy

[28] Rule 227 empowers the Court to grant a variety of sanctions where it is satisfied that an affidavit of documents is inaccurate or deficient. These can include ordering an accurate or complete affidavit to be served; striking out all or part of the offending party's pleading; or requiring the offending party to pay costs. Meridian asks that the Court strike those paragraphs in Concept's Statement of Defence and Counterclaim that allege that the '430 Patent is invalid for anticipation or obviousness based on the JTL Hopper.

[29] This Court has recognized that striking all or part of a pleading is a “very drastic remedy” for a procedural failure, and should not be granted except where it is very clear that the party’s conduct is an abuse of process: *Canadian Private Copying Collective v Red Coast Imports Inc*, 2009 FC 97 at para 33, citing *H Smith Packing Corp v Gainvir Transport Ltd*, [1991] FCJ No 319 (TD). This is far from such a case. The drastic sanction of striking paragraphs of Concept’s Statement of Defence and Counterclaim is not warranted.

[30] Meridian next asks that Concept be prevented from relying on the new documents at trial. I note that this is not a remedy expressly contemplated under Rule 227. Rule 232 provides that absent contrary order or waiver, a document shall not be used in evidence at trial unless it has been disclosed on a party’s affidavit of documents, produced for inspection on or subsequent to examinations for discovery, or produced by a witness who is not under the control of the party. In the present case, the documents in question were produced subsequent to examinations for discovery and have since been disclosed on a supplementary affidavit of documents prepared by Concept. As Justice Pelletier, then of this Court, stated, the remedy for lack of timeliness in documentary disclosure is an adjournment to permit a party to pursue the remedies otherwise provided in the *Federal Courts Rules*; it is not to exclude evidence that would otherwise be admissible: *Halford v Seed Hawk Inc*, 2001 FCT 1195 at para 12.

[31] In any event, even if the relief requested by Meridian were available as a pre-trial sanction for late discovery of documents, I conclude it would not be appropriate in this case. The trial in this matter is scheduled for January 2025, over seven months from now. Meridian has not alleged that it is unable to respond to or address the new documents, nor pointed to any other

prejudice beyond costs thrown away. In this context it would not be in the interests of justice to prevent Concept from adducing potentially relevant prior art based on its late disclosure: *Halford* at paras 11–13; see also *Janssen Inc v AbbVie Corporation*, 2014 FCA 242 at paras 17–19, addressing a late amendment to plead additional prior art.

[32] In the alternative to these more drastic remedies, Meridian asks that the Court impose a serious costs sanction on Concept for its late production of the documents. It suggests an award in the range of \$200,000. Meridian filed little evidence to support this claim of costs, but it appears to cover a large portion of its costs to date in this proceeding, including those related to the summary judgment motion. As Concept notes, the costs of that motion were addressed by Justice Zinn and I have neither the authority nor the inclination to re-open that costs award.

[33] In this regard, Meridian asserts that much, if not all, of the “value” of the unsuccessful summary judgment motion, in the sense of experts becoming familiar with the matter and evidence being prepared that can be re-used at trial, has been lost or wasted as a result of the new documents, which materially alter the nature of the case. Even if this were an appropriate basis for an award of costs, which I question, it would effectively compensate for costs of the summary judgment motion in a manner contrary to Justice Zinn’s order. In any event, the record on this motion provides no basis for the Court to assess, let alone quantify, the extent of such a loss in value.

[34] That said, in my view, it is appropriate in this case to award costs pursuant to Rule 227(d). I need not order that Meridian be permitted to continue its examination for

discovery of Mr. Thiessen, as Concept recognizes and agrees that such a continuation must be allowed. However, in the circumstances of this case, an award of costs is appropriate that reasonably reflects the additional costs incurred and to be incurred by Meridian arising from the fact that Concept did not disclose the new documents until after Mr. Thiessen was first examined for discovery.

[35] If Concept had made adequate efforts to locate, identify, and produce the documents before Mr. Thiessen's examination, Meridian would still have had to prepare for and conduct examination on those documents. This would no doubt have lengthened the examination by approximately the length of time that the continued examination would take. Such costs are appropriately dealt with, along with other discovery costs, by the trial judge at the completion of trial. However, I conclude it is appropriate to make an award of costs to reflect the inefficiencies inherent in having to examine on the new documents at a second attendance rather than as part of a single examination for discovery. This includes the additional disbursements associated with travel to attend the second attendance, which would not have been incurred at a single examination. It also includes some reflection of the inefficiencies in counsel having to prepare for and attend a second examination rather than examining on all matters at the same time.

[36] While Meridian agreed that such costs thrown away ought to be recoverable at the very least, it was unable to provide an estimate of what those costs would be. Despite this, and the lack of evidence speaking directly to the costs thrown away by virtue of the late production, I am satisfied that it is appropriate to make an award of costs based on the Court's experience and best estimate of the costs related to such inefficiencies and re-attendance. In my view, a best estimate

of the costs of such inefficiencies, in the context of the particular nature of this action, the discoveries conducted to date and the new documents, is \$4,000. For clarity, this does not estimate the cost of the discoveries or continued discoveries as a whole, which are matters for the trial judge, but simply the costs thrown away on the discoveries by virtue of the late production of documents.

[37] I will therefore order, as a sanction for Concept's production of a deficient affidavit of documents pursuant to Rule 227(d), that Concept pay to Meridian, forthwith and in any event of the cause, the sum of \$4,000 on account of costs of examinations for discovery thrown away as a result of the late production of documents. Concept shall also pay any travel costs of Mr. Thiessen and its own counsel associated with the continued discovery of Mr. Thiessen in Winnipeg. If the parties agree to conduct the continuation of the discovery either by videoconference or in another location, they may agree on another equivalent allocation of travel costs.

D. *Substitution of Corporate Representative*

[38] Meridian seeks an order pursuant to Rule 237(3) that Mr. Rosumowitsch attend to be examined for discovery on questions arising from the answers to undertakings previously given, and on the new documents. Effectively, Meridian asks that the Court order that Mr. Rosumowitsch be examined in place of Concept's selected representative, Mr. Thiessen, for the continuation of the discovery.

[39] The basis for Meridian’s request is that Mr. Rosumowitsch’s is the author of the “Summary of different variations of the JTL aeration that were built over the years” document described above, and also obtained seven of the other documents produced. Meridian argues that Mr. Rosumowitsch is the best witness to speak to the summary document and to the relevant design issues, while Mr. Thiessen cannot give his own knowledge or inform himself to the same extent as Mr. Rosumowitsch.

[40] Rule 237(1) provides that a corporate party is entitled to select a representative to be examined on its behalf. As the parties agree, on a motion for substitution under Rule 237(3), the Court will consider the factors set out in *Liebmann v Canada (Minister of National Defence)*, [1996] FCJ No 536 at para 31: see *Boehringer Ingelheim Canada Ltd v Teva Canada Limited*, 2021 FC 227 at paras 23–24. As expressed in *Liebmann*, the onus is on the party seeking substitution to demonstrate objectively the unsuitability of the corporation’s selected representative, by showing that they are incapable of giving evidence of their own knowledge or by informing themselves, or that the second witness is in a “much better position” to give evidence: *Liebmann* at para 31(1)–(3). Other factors may include convenience, expense, the responsiveness of the witness, the degree to which the witness has taken pains to inform themselves, and the circumstances of the case as a whole: *Liebmann* at para 31(4)–(6).

[41] Meridian has not satisfied me that Mr. Thiessen is not an appropriate witness or that Mr. Rosumowitsch is in a much better position to give evidence. While Mr. Rosumowitsch would evidently be best able to speak to the document he authored, this is but one document among the many new documents produced. Meridian has not demonstrated that Mr. Thiessen

would be unable to inform himself with respect to the evidence, to put questions to Mr. Rosumowitsch by way of undertaking, or to speak to other aspects of the new documents so as to justify the substitution of Mr. Rosumowitsch.

[42] Meridian's request for an order under Rule 237(3) will therefore be dismissed, without prejudice to its ability to seek substitution if it turns out that Mr. Thiessen is an inappropriate witness on the continued examination such that the criteria for an order for substitution are met.

E. *Particulars of Prior Art (Question 348)*

[43] Meridian asks that Concept advise of and particularize the relevance of the three patents or patent applications disclosed in Concept's original affidavit of documents. Concept argues that the patents in question are not particularly long, that they go directly to the subject matter in question, and that it is effectively relying on each of them, in their entirety, in respect of each of its anticipation, obviousness, and *Gillette* defence arguments, such that particularization is unnecessary.

[44] I agree with Meridian that the jurisprudence establishes that "[t]he plaintiff is entitled to be told the parts of those prior patents or prior publications the defendant relies on to establish anticipation or obviousness," that the defendant must be specific, and that merely scheduling a list of prior art is insufficient: *Dek-Block Ontario Ltd v Béton Bolduc (1982) Inc*, [1998] FCJ No 680 at paras 15–17, 26–27; *Denharco Inc v Forespro Inc*, [1999] FCJ No 849 at para 4. Despite the asserted brevity of the patent documents at issue, and recognizing that further detail

will no doubt be forthcoming in expert reports, Meridian is entitled to a degree of specificity as to the parts of each piece of prior art on which Concept relies for each of its invalidity defences.

F. *Redacted Documents*

[45] On discovery, Meridian asked Concept to produce sample invoices for sales of its product. Concept did so, providing two sample invoices, from which it had redacted the identity of the customer and pricing information. Meridian seeks unredacted copies of the documents, asserting that this is the “default” position with respect to the production of documents and noting that there is no evidence regarding any material confidentiality or privacy concerns. Concept underscores that this action has been bifurcated, such that pricing information is not relevant, and that the privacy and confidentiality concerns regarding customer and pricing information are self-evident.

[46] While the general rule is that the entirety of a document that contains relevant information is to be produced, a receiving party is not in all cases entitled to production of an entire, unredacted document: *Eli Lilly Canada Inc v Sandoz Canada Incorporated*, 2009 FC 345 at para 14. Redactions may be permissible where the redacted information is clearly irrelevant, it would clearly not assist in properly understanding the relevant portions, and important confidentiality concerns exist. As Associate Judge Tabib noted in *Eli Lilly*, where a redaction is made, mechanisms can be provided for outside counsel to view the unredacted document: *Eli Lilly* at para 14. In the circumstances, given the nature of the documents, the basis on which they were provided, and noting that this matter has been bifurcated and is being specially managed, I conclude that it is appropriate to require Concept to produce an unredacted copy of

the invoices to counsel for Meridian on a “counsel’s-eyes-only” basis. If Meridian’s counsel, on reviewing the complete document, considers that it is important that their client be able to review the matter and/or that the complete document be used in evidence, they may bring the matter back to the Court informally to address the issue further.

[47] The remaining issues raised in Meridian’s motion have been resolved between the parties or withdrawn.

III. Concept’s Motion

[48] By the time of the hearing, only two issues raised in Concept’s motion had not been resolved between the parties or withdrawn. Each (Questions 107 and 263) related to a refusal by Meridian to provide undertakings at the examination for discovery of its representative, Mr. Plett. Concept advised the Court that it was no longer pursuing its request to have Mr. Plett re-attend for continued discovery.

A. *Question 107*

[49] Concept asks that Meridian provide the names and contact information of Meridian employees involved with respect to the manufacture of the “product outlined in” the ’430 Patent, *i.e.*, Meridian’s hopper support product. It argues that Rule 240(b) of the *Federal Courts Rules* permits it to ask for the name and address of those who might be expected to have “knowledge relating to a matter in question in the action.” It argues that the individuals responsible for Meridian’s product may have knowledge about earlier iterations of that product produced prior

to the '430 Patent, which would be relevant to the invalidity issues. It also notes that Meridian tendered evidence from its employees related to infringement and validity in the context of the summary judgment motion.

[50] I am not satisfied that the question seeks the name and contact information of individuals who might be expected to have knowledge relating to a matter in issue. The contention that these individuals might have knowledge about other prior art is no more than speculation and amounts to a fishing expedition. This is particularly so as Concept has not pleaded or alleged that the '430 Patent is invalid in light of prior disclosure by Meridian. As Meridian points out, the question of infringement involves a comparison of Concept's product to the '430 Patent, not to Meridian's product. While Meridian's product, and whether it is an embodiment of the '430 Patent, may potentially be relevant to the issue of obviousness in the event that, for example, commercial success is raised as an issue, there is no indication at this stage that Meridian is relying on commercial success of its product to counter Concept's allegation of obviousness.

[51] Meridian is not required to answer Question 107.

B. *Question 263*

[52] Concept asked Mr. Plett at his examination for discovery whether the factual allegations in the Statement of Claim were accurate, to the best of his knowledge. Meridian objected to the question, while allowing Mr. Plett to answer questions regarding specific factual allegations in the Statement of Claim. Concept argues that Mr. Plett admitted that certain paragraphs in the

Statement of Claim were factually inaccurate, and notes that Meridian has refused to amend its Statement of Claim to correct these inaccuracies until a decision is rendered on this motion. It contends that Meridian should be required to identify at least any further factual inaccuracies in the Statement of Claim.

[53] I agree with Meridian that Concept's question is too broad to be a reasonable discovery question. While factual questions directed at the allegations in the Statement of Claim are appropriate, and were answered, the question directed generally at all of the factual allegations in the Statement of Claim as a whole is overly broad.

[54] Meridian is not required to answer Question 263.

IV. Costs of the Motions

[55] Neither party filed a bill of costs with respect to the motions. Each party made submissions on costs based on the Court's indications during the hearing as to the disposition of the various issues raised.

[56] Meridian argued that it was largely successful on the motions, obtaining relief arising from Concept's failure to comply with its discovery obligations. It argues it was justified in bringing its motion, while Concept was unsuccessful on the two outstanding issues raised on its motion. Meridian therefore argued it should be granted costs of the motions, but did not make submissions as to the quantum of those costs.

[57] Concept also argued that it was largely successful. It noted that the two main grounds for relief on Meridian's motion, namely striking its pleading or prohibiting it from relying on the new documents, were serious consequences that required it to respond to the motion. Since Meridian was unsuccessful on those grounds, Concept argues that it should be awarded costs. Concept also did not make submissions on the quantum of those costs, but argued that such costs should effectively be the same as any costs awarded as costs thrown away by virtue of the late production, so that the two amounts would offset.

[58] In the exercise of my discretion under Rule 400, and considering the context of the motions described above, including the complexity of the issues; the parties' respective successes on the various aspects of the two motions; the issues raised, resolved, and determined by the Court; the seriousness of the requests to strike or prohibit Concept from relying on the documents; the amount Meridian sought in costs thrown away compared to the amount it was awarded; and the concerns of the Court regarding the manner in which Meridian presented without prejudice communications, I conclude that the net costs of the motions should be awarded to Concept in the inclusive amount of \$1,500. While there is some strength to Concept's argument, made with reference to Rule 401(2), that aspects of Meridian's motion should not have been brought, I conclude that this cannot be said about the motion as a whole. Costs of the motions will therefore be payable to Concept in any event of the cause.

V. Conclusion

[59] For the foregoing reasons, Meridian's motion is granted in part, while the few unresolved issues on Concept's motion are dismissed. Concept shall pay to Meridian forthwith and in any

event of the cause the amount of \$4,000, representing costs thrown away as a result of Concept's failure to meet its discovery obligations. Concept shall also pay, and shall not recover in any event of the cause, any travel costs of Mr. Thiessen and its own counsel associated with the continued discovery of Mr. Thiessen in Winnipeg.

[60] Meridian's request to examine Mr. Rosumowitsch under Rule 237(3) is dismissed, while its request for an answer to Question 348 and for unredacted documents shall be answered in accordance with these reasons. With respect to Concept's motion, Meridian shall not be required to answer Question 107 or Question 263.

[61] Net costs of the motions are payable to Concept in the all-inclusive amount of \$1,500, payable in any event of the cause.

[62] The parties are to confer and submit, within 10 days of the date of this Order, a proposed timetable for the completion of next steps in the proceeding, including the conduct of further discoveries and the matters set out in paragraphs 4 to 7 of the Court's Order of May 18, 2023.

ORDER IN T-1506-20

THIS COURT ORDERS that

1. Pursuant to Rule 227(d), Concept Industries Ltd shall pay to Meridian Manufacturing Inc the sum of \$4,000, forthwith and in any event of the cause, and shall further pay, and shall not recover in any event of the cause, any travel costs of Lonny Thiessen and its own counsel associated with the continued examination for discovery of Mr. Thiessen in Winnipeg, Manitoba.
2. Concept shall provide a response to Question 348 on the examination for discovery of Mr. Thiessen in accordance with the reasons given for this Order.
3. Concept shall produce an unredacted copy of the documents at pages 219 and 220 of Meridian's motion record to counsel for Meridian. Counsel for Meridian shall treat the unredacted copies confidentially and shall not disclose the documents to any third party, including Meridian or its representatives, unless and until permitted to do so by further order of the Court.
4. The parties' motions are otherwise dismissed.
5. Net costs of the motions are payable by Meridian to Concept in the all-inclusive amount of \$1,500, in any event of the cause.
6. Within 10 days of the date of this Order, the parties are to confer and submit a proposed timetable for the completion of next steps in the proceeding, including the conduct of further discoveries and the matters set out in paragraphs 4 to 7 of the Court's Order of May 18, 2023.

“Nicholas McHaffie”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1506-20

STYLE OF CAUSE: MERIDIAN MANUFACTURING INC v CONCEPT INDUSTRIES LTD

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: APRIL 15, 2024

ORDER AND REASONS: MCHAFFIE J.

DATED: APRIL 22, 2024

APPEARANCES:

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